1992

Utah Department of Transportation v. 6200 South Associates a General Partnership; H. Roger Boyer, and Kem C. Gardner: Reply Brief

Utah Court of Appeals

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

UTAH DEPARTMENT OF TRANSPORTATION,	:	
Plaintiff and Appellee,	:	Case No. 920268-CA
vs.	:	Priority 15
6200 SOUTH ASSOCIATES, a General Partnership; H. ROGER BOYER, and KEM C. GARDNER,	:	
Defendants and Appellants.	:	

REPLY BRIEF OF APPELLANTS

Appeal from the Third Judicial District Court, Salt Lake County, The Honorable Pat B. Brian, District Judge

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Defendants and Appellants 6200 South Associates, H. Roger Boyer and Kem C. Gardner (collectively referred to as "6200 South Associates"), submit the following Reply Brief of Appellants:

DETERMINATIVE RULE

The only determinative constitutional provision, statute, ordinance or rule are Rules and 703 and 801(d)(2) of the Utah Rules of Evidence which are attached as Exhibit "A."

SUMMARY OF ARGUMENT

UDOT's Brief is a virtual confession of prejudicial error. It starts with UDOT's witness, VanDrimmelen, intentionally set-up evidence on the inadmissible Chevron Oil offer. UDOT has no rational explanation as to how the Chevron offer can stand.

Second, the ruling of the trial court in permitting UDOT, through its witness Clinger, to testify as to undefined and unknown properties with undefined access and without any evidentiary foundation was erroneous and highly prejudicial. UDOT's admission in its brief that the purpose of the evidence was to show that unknown "investors" were willing to invest unknown "resources" in unknown "properties" is the undoing of UDOT's masquerade.

Third, to bar the Landowner's counsel from conducting cross-examination, using hypothetical questions to test the validity and credibility of UDOT's experts, is now unquestioned error. It was prejudicial, particularly when combined with other error of trial.

Fourth, it was prejudicial error for the trial court to allow UDOT to take the position at trial that the diamond interchange of I-215 BEFORE condemnation of the property in this case led to an insular county lane. UDOT had lost on that issue in a three-day

bench trial before the lower court in which the court determined that the subject property should be considered as abutting upon I-215 and ancillary roads because the freeway had been planned and property acquired for it in the early 1960s. But UDOT virtually scuttled the lower court ruling by having its appraisers take the position at trial that the diamond interchange, upon which the property abutted and as to which UDOT had committed under oath to build, was essentially of no value because the freeway would have dumped its traffic onto a patently unreasonable and unsafe secondary lane. By permitting UDOT to subvert the trial court's earlier bench ruling, the court essentially permitted its initial bench ruling to be overturned.

In summary, the diseased Chevron offer allowing the jury to hear values of $12 - $18 per square foot for the remaining property suggested fundamentally, as UDOT argued, that UDOT did the Landowner a favor by condemning all of the property's prime access and air, light and view. The supposed curative instruction of the trial court only reinforced the evidence of the offer for it allowed the jury to consider existence of the offer with only the numbers having been stricken. That evidence, alone, warrants a reversal and new trial. Combined with the other imperfections as set out in this appeal, it fully justifies setting aside the judgment of the court and remanding the case for a new trial on the issues of compensation and damages.

ARGUMENT

POINT I.

A THIRD PARTY OFFER ON THE LANDOWNERS' PROPERTY IS FLATLY INADMISSIBLE AND CANNOT BE RATIONALIZED AS AN ADMISSION AGAINST INTERESTS OF 6200 SOUTH ASSOCIATES.

A. The Chevron Offer from a Third Party Was Not Admissible.

In the lower court, UDOT did not challenge the proposition that offers on a landowner's property made by a third party are inadmissible.[1] UDOT cannot now raise that claim for the first time on appeal.[2] UDOT, however, argued then and now argues[3] that the tainted VanDrimmelen testimony regarding the purported Chevron Oil offer "may have been admissible as an admission against interest."[4]

UDOT's argument is indefensible as a matter of law. Rule 801(d)(2) of the Utah Rules of Evidence puts the argument to rest:

> (d) **Statements Which Are Not Hearsay.** A statement is not hearsay if:
>
> . . . .
>
> (2) **Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, ...

(Emphasis added.) The plain reading of Rule 801(d)(2) demonstrates

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[1]UDOT's Memorandum of Points and Authorities in Opposition to Defendant's Motion for Additur or Alternatively for a New Trial at 19-20 (R. 369-70) ("UDOT's Memo").

[2]E.g., State By & Through Its Road Commission v. Larkin, 27 Utah 295, 495 P.2d 817, 821 (1972).

[3]Appellee's Br. at 18-19.

[4]UDOT's Memo at 3 (R. 353).

that, at minimum, an admission against interest must be a statement made by a "party-opponent," viz., by one of the partners of 6200 South Associates. The authority cited and quoted in UDOT's Brief at 18-19 specifically refers to "declarations by an owner,"[5] "admissions of a party . . . his agent . . . or by a privity,"[6] or "any statement . . . made by a party."[7] But VanDrimmelen's evidence was that the statement came from a Chevron Oil employee.[8] Chevron was not a party-opponent and, thus, does not fall within Rule 801(d)(2). VanDrimmelen's testimony on the supposed Chevron offer was hearsay and fundamentally inadmissible.

B. The Cases Cited by UDOT do not Support the Admissibility of VanDrimmelen's Testimony On the Chevron Offer.

On the critical question of admissibility of VanDrimmelen's testimony on the Chevron offer, UDOT misstates the holdings it cites. It cites Nichols on Eminent Domain and three cases in support of the doubtful proposition that notwithstanding Rule 801(d)(2), "an offer is admissible for the purpose of showing interest in property for a particular use."[9] The cases do not so hold.

In City of St. Louis v. Vasquez, 341 S.W.2d 839 (Mo. 1960), the Missouri court held that testimony that there had been "a

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[5]Lake County Forest Preserve Dist. v. O'Malley, 421 N.E.2d 980 (Ill. 1981).

[6]29 Am. Jur. 2d Evidence § 600 at 655.

[7]Korleski v. Needham, 222 N.E.2d 334, 337 (Ill. 1966).

[8]Tr. at 684-85 (R. 1103-04).

[9]Appellee's Br. at 9 (emphasis added).

marked number of inquiries" by persons interested in purchasing the land "was not the equivalent of an offer to buy, and was not inadmissible for the reasons . . . that an offer to buy is inadmissible." Id. at 848 (emphasis added). The court found that there was no evidence of any offer in Vasquez. Thus, the case stands for the direct contrary of the proposition cited by UDOT. As Vasquez acknowledges, "an offer to buy is inadmissible." Id.

UDOT quotes, as though it were law, pure *dicta* from Kelly v. Redevelopment Authority of Allegheny Co., 180 A.2d 39 (Pa. 1962). In that case counsel made a proffer of evidence that an offer had been made. The trial court ruled "I will not permit evidence of the price, but I will permit you to show that an offer was made." However, "[n]otwithstanding this ruling counsel . . . did not then produce any testimony of offers made." Id. at 44 (emphasis added). Because the issue in Kelly was whether the lower court erred in excluding the amount of the offer, and because the offer itself was never offered in evidence, Kelly is not the law of Pennsylvania on whether an offer is admissible for some other purpose than value. Much less is it the law of the State of Utah.

Commonwealth Department of Highways v. Turner, 497 S.W.2d 57 (Kan. 1973), like Vasquez, stands for the antithesis of the proposition cited by UDOT. The audacity of UDOT's citation of Turner is apparent when the language omitted from the quotation in UDOT's brief is considered:

> The Commonwealth complains that over its objections the owners were permitted to introduce evidence of inquiries concerning the possible purchase or lease of the property. A

> witness was asked whether he had been ". . . approached by any major oil company or any motel people or persons in business with shopping centers . . ." with respect to acquiring the property ". . . in the area that has been taken by the Commonwealth in this condemnation." Over an objection the witness was permitted to answer, which answer indicated that there had been such inquiries. [Another witness was similarly permitted to testify, yes or no, as to whether there had been such inquiries.] No witness was asked about prices or terms of any offer and the evidence was restricted to inquiries showing an interest in the property. It is our opinion that this evidence was properly admitted and did not fall into the category of offers, which, of course, may not be shown.

Id. at 59-60 (emphasis added).

The statement by Nichols, supra, is without support, is vacuous and would turn eminent domain cases into a folly in which UDOT would be on the other side the great bulk of the time. It has only a trio of Missouri and Pennsylvania cases more than 30 years old which, on examination, do not stand for the proposition in support of which they are cited.

Had UDOT's argument confined itself to a consideration of the implications of established Utah law in this area, it would have found that the policy of Utah eminent domain law is clearly inconsistent with the admissibility of offers by a third party. As the Utah Supreme Court observed in State v. Tedesco, 291 P.2d 1028 (Utah 1956), a jury

> are not to inquire what a speculator might be able to realize out of a resale in the future, but what a present purchaser would be willing to pay for it in the condition it is now in.

Id. at 1030. Utah thus finds itself among the vast majority of

jurisdictions of whom Nichols remarks, "it is thought best by most courts to reject evidence of offers altogether." 5 Nichols on Eminent Domain § 21.4[1].

POINT II.

THE LOWER COURT DID NOT INSTRUCT THE JURY TO DISREGARD ALL OF UDOT's EXPERT's TESTIMONY REGARDING THE INADMISSIBLE CHEVRON OFFER TO PURCHASE AN UNDEFINED PORTION OF THE REMAINING PROPERTY.

UDOT exacerbates the error of the trial court by arguing that 6200 South Associates objected to the VanDrimmelen testimony, moved to strike the same, and that it was granted. From that UDOT contends that the Landowner "cannot complain where its objection has been sustained."[10] UDOT is in error. 6200 South Associates' motion to strike went to all of VanDrimmelen's testimony on the Chevron offer. UDOT acknowledged the error but contended that only the alleged offering price should be stricken. The lower court agreed with UDOT, instructing the jury to disregard only the $12.00 and $18.00 per square foot pricing terms.

There now can be no doubt that UDOT was aware that the testimony relating to the Chevron offer would be blurted out by VanDrimmelen,[11] UDOT does not even bother to assert otherwise in its

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[10]Appellee Br. at 13-14.

[11]In a moment of candor, in argument on appellant's motion to strike this portion of Mr. VanDrimmelen's testimony, Mr. Coleman for UDOT stated as follows:

> Your Honor, I would agree with counsel that the amount should not have come in. I did not anticipate that they would. . . .

brief. While it is true that the Court initially sustained the Landowners' objection to the inadmissible Chevron offer,[12] that objection only could be made after the testimony came in because the question did not illicit testimony relating to an offer: the question did not even mention the word "offer." After counsel argued the point outside of the jury's presence, the lower court gave the following instruction to the jury:

> THE COURT: The record will reflect the presence of the jury, the alternative, counsel and the parties. Ladies and gentlemen, it is not uncommon for the Court, in a trial of this complexity and this duration, to occasionally tell the jury to just disregard something they have heard. The Court is telling you to do that. It happens occasionally. And the Court has confidence in the maturity and the responsibility of the jurors to the extent that they will do as the Court tells them.
>
> There has been some testimony given by the witness now on the stand [VanDrimmelen] regarding statements made by a Mr. Jacobsen, and confirmed by Chevron Oil, regarding the value of the questioned property per square foot. Specifically, there was a reference of $18 per square foot with access, $12 per square foot without access. Supposedly, that value was confirmed by a representative of Chevron Oil. Disregard that portion of the expert witness' testimony that referred to that subject matter.

Tr. 700-01 (R. 1119-20) (emphasis added).[13]

The curative instruction the lower court gave to the jury, therefore, did not solve the problem. The jury was left to

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[12]Tr. 685-86 (R. 1104-05).

[13]The original testimony and ruling, the argument of counsel, the Court's ruling, and the Court's instructions to the jury are reproduced in full in attached Exhibit "B" hereto.

consider in its deliberations that Chevron had made an offer for an undefined portion of the property. UDOT did not lay any foundation as to whether the supposed Chevron offer covered one-tenth of an acre, five acres, or all of the remaining 18.7 acres. It was not, as UDOT contends, the Landowner's obligation to emphasize inadmissible testimony.

The whole VanDrimmelen saga as staged and orchestrated was highly prejudicial to 6200 South Associates. Most of VanDrimmelen's testimony on Chevron remained before the jury. Only the "technicality" of the price per square foot was struck, with many of the jurors having every reason to believe that the Chevron offer was most relevant, but for some esoteric reason in the law, the so-called offering price could not remain. The damage from this tainted and incompetent testimony was sought and achieved by UDOT.

There is an almost fatuous contradiction to the staged VanDrimmelen testimony. He had contended to the point of advocacy throughout his testimony that the property could not have commercial potential or use BEFORE or AFTER the taking because the Landowner could not obtain commercial zoning.[14] On the other hand, the Landowner never took the position that the remaining property in the AFTER condition had commercial potential or use.[15] What then, one must ask, was the basis of VanDrimmelen's testimony of the supposed Chevron Oil offer? Clearly, this Chevron testimony

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[14]Tr. at 683-84 & 686 (lines 19-21) (R. 1102-03 & 1105).

[15]Cook [Tr. 289 (R. 709)]; Brown [Tr. 472 (R. 891)].

of $12 - $18 per square foot was not in rebuttal to the Landowner's testimony and it contradicted VanDrimmelen's own opinion on use and value AFTER the taking.

The answer to the question and to the VanDrimmelen nonsequitur lies in the fact that by this diseased Chevron offer, UDOT was able to get before the jury the hocus-pocus values of $12 - $18 per square foot for some undefined portion of the remaining property AFTER the taking, when both the Landowner's and UDOT's testimony as to land value BEFORE the taking ranged between $2.50 and $4.00 per square foot. Quite obviously, the $12 - $18 per square foot price would have had to refer to commercial use and value. Accordingly, even though the Chevron testimony cut squarely against VanDrimmelen's unrelenting opinion against commercial use and value AFTER the taking, it was worth it to UDOT, for it planted in the jury's mind the distinct possibility that the remaining property could be worth as much as six times more AFTER than it was BEFORE condemnation. Thus, UDOT could argue (as it did) that UDOT had done the Landowners a favor by condemning all of their prime access and that the Landowners had achieved, consequently, an extraordinary windfall. Therein lies the irreparable prejudice and reversible error from which UDOT cannot escape.[16]

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[16]Utah Department of Transportation v. Rayco Corp., 599 P.2d 481 (Utah 1979).

POINT III.

UDOT's ARGUMENT WITH REGARD TO THE ADMISSIBILITY OF UNDEFINED PROPERTIES IN DOCTORED PHOTOGRAPHS IS WITHOUT PRECEDENT AND VACUOUS. ALONE, IT REQUIRES A REVERSAL OF THE JUDGMENT AND A NEW TRIAL.

UDOT's justification for the use by its witness, Clinger, of tampered photographs demonstrating undefined and unknown properties as evidence of access in the case is rapacious and without any authority. UDOT proffered and the trial court allowed, over consistent objection of the Landowner, Clinger's half-a-dozen photographs of various freeway interchanges in which properties were situated in varying degrees of proximity. But the record is absolutely clear that:

1. Clinger did not identify one, single property by demonstrating its size, shape, means of access, zoning or any other element of relevance to the subject property;
2. Clinger did not identify the properties by ownership, by sale that had taken place, by a comparison of a sale with and without freeway influence;
3. There was not a scrap of evidence to indicate the ability of the photographed properties to compete, whether the land and improvements could be reasonably used in the market, the nature of businesses or their condition;
4. To sum up, UDOT's Clinger offered not a shred of evidence about any properties or their use -- merely aerial photographs of several interchanges in the metropolitan Salt Lake area.

UDOT's confession of what Clinger's use of the photographs and the "phantom" properties should not be lost on this Court. UDOT writes in its brief as follows:

> Mr. Clinger testified regarding five developments on or near interchanges that had been developed for commercial - business type uses. The purpose was to show that investors had been willing to invest considerable resources to develop properties with access restrictions similar to the subject.

UDOT Br. at 21-22.

Of course, the burning questions are what property or assortment of properties constituted "five developments?" What "investors" were willing to "invest considerable resources?" "What properties had access restrictions similar to the subject?" UDOT had no answer to any of these questions for this Court in its appeal brief or at trial, either on direct examination or on cross-examination by the Landowner. The law requires otherwise. RDA of Salt Lake City v. Mitsui Inv. Inc., 522 P.2d 1370 (Utah 1974); (see citation of Utah authorities in Appellants' Opening Br. at 24, fn. 5.) The photographs of undefined and unknown properties were introduced without required foundation and UDOT's argument thereon is vacuous.

UDOT's argument that the doctored photographs were admissible simply because Clinger stated he had taken the photographs into account in forming his opinion must be rejected. Acceptance of that argument would permit UDOT to manufacture a rule of law that so long as a party could get an expert witness to say that a certain factor was taken into account, such factor would be

admissible. Such an argument would lead straight to the proposition that the expert witness and not the court would determine admissibility of elements to support an expert opinion. It would allow in this case, for example, the appraiser to use a photograph of unknown properties in Chicago or Los Angeles without any foundation.

UDOT's position on this Point of the appeal makes a travesty of the law and of Utah Rules of Evidence 703. That Rule permits an expert to predicate an opinion upon information "reasonably relied upon by experts in the particular field." There was no evidence produced through Clinger or otherwise that the photographs showing the unknown and undefined properties with unknown and undefined access is information that that is ordinarily relied upon by appraisal experts.

The admission of the "sheen green" photographs was prejudicial error by the trial court and requires a reversal and new trial.

POINT IV.

THE RESTRICTIONS PLACED UPON THE LANDOWNERS' CROSS-EXAMINATION OF UDOT's EXPERT WITNESSES UTILIZING HYPOTHETICALS NOT BASED UPON EVIDENCE IN THE RECORD WAS IMPROPER AND PREJUDICIAL.

UDOT argues in its brief that "some" hypothetical questions were allowed on cross examination by the Landowner of UDOT's experts, and therefore, the Landowner was given an ample opportunity to cross-examine UDOT's expert appraisal witnesses. That contention is ill-conceived. UDOT's brief at 27, 28.

The fact that some of hypothetical questions were allowed is

not relevant. One hypothetical question lays the foundation for a point which tests the expert's opinion only after following hypotheticals have been asked. It may not be until the last question is asked that the point to which the hypothetical cross-examination is directed may be established, resulting in the expert's confession of error, confusion or unreasonableness. The substantial relationship between access to property and the property's value was a lynch pin question in the entire case. The trial judge cut off hypothetical cross examination regarding it.

Cross-examining an experienced government witness may be one of the most difficult tasks facing the trial lawyer. To impose unwarranted restrictions on cross-examination as was done in this case, chokes off the development of evidence necessary to a reasoned verdict. Utah case law encourages cross-examination utilizing hypotheticals whether or not found upon facts in the record. In a landmark case decided by the Utah Supreme Court in 1953, State of Utah v. Peek, 265 P.2d 630 (Utah 1953), the high Court specifically declared:

> A witness who has given an opinion of value may . . . in the discretion of the court, be asked questions on cross examination, fore the purpose of testing his opinion, which would be improper upon direct examination. He may, for example, be asked how far certain assumed facts would modify his judgment. . . .

Id. at 638.

Why UDOT fails to cite the above-quoted portion of Peek is not answered. UDOT's reliance upon a 90 year old case, Nichols v. Oregon Shortline R.R. Company, 25 Utah 240, 70 P. 996 (1902), is

misplaced. A careful examination of the facts in Nichols clearly demonstrates that the principle for which UDOT cites the case is not the law. The holding of the Utah Court in Nichols was that a hypothetical question on cross-examination was required to contain all material facts in the record relating to the matter. If the question omitted any material fact, it was improper. That has not been the law in Utah for at least 40 years.

UDOT's argument is flawed. The trial judge clearly erred prejudicially in failing to permit hypothetical questions to be asked of UDOT's experts on the critical subject of loss of access.

POINT V.

UDOT's EXPERTS INTENTIONALLY DISTORTED THE RELATIONSHIP OF THE TOTAL PROPERTY BEFORE CONDEMNATION TO THE I-215 FREEWAY AND SUPPORTING ROADS, WHICH DISTORTION SUBSTANTIALLY CIRCUMVENTED THE LOWER COURT'S PRIOR RULING.

A strange paradox developed in the trial of this case. After several days of a bench trial, legal memoranda and oral argument, the lower court properly ruled that the I-215 Project, in all of its aspects, had to be taken into account in determining market value of the subject property as of the date of taking. It would have defied not only common sense, but virtually every aspect of public highway planning for the I-215 Diamond Interchange to have been constructed (as was necessarily assumed) in the Court's ruling without supporting and corollary access roads to feed the interchange. UDOT was clearly aware of that fact and had shown a connector road to the interchange (whether Diamond or Urban) long

before the 1989 Urban Interchange was finalized and 6200 South Associates' property was condemned.

Nonetheless, at trial, UDOT intentionally distorted the BEFORE condition of the subject property under the guise that the Diamond Interchange would dump its traffic on to patently inadequate county lane at 6200 South. The trial evidence of the Landowners properly assumed that the express connector road from the mouth of Big Cottonwood Canyon would tie the diamond Interchange of I-215. For UDOT to rest its case on the premise that the 1979 Diamond Interchange would be hobbled with an unsafe and improper secondary lane undermined and mocked the earlier ruling of the lower court.

The introduction of that evidence at trial was error for which a new trial should be granted.

POINT VI.

THE FACT THAT THE JURY VERDICT IS IN THE RANGE OF THE APPRAISAL ESTIMATES IS OF NO CONSEQUENCE IN THIS APPEAL WHERE THE APPEAL IS ON ISSUES OF LAW OTHER THAN INADEQUACY OF THE VERDICT.

UDOT claims that there is no reversible error because the jury verdict was within the range of the appraisers' testimony.[17] That is only the presumption where the inadequacy of the award, as a matter of law, is appealed. The Landowner has not raised that issue in this appeal. Rather, it is the individual and cumulative weight of the prejudicial errors addressed in the Landowner's Opening Brief that resulted in a skewed and improper jury verdict

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[17]UDOT Br. at 39-40.

favorable to UDOT. The low amount of the jury verdict only emphasizes the significance and prejudice of the errors.

The effect of the inadmissible Chevron offer and the undefined property photos, alone, in the minds of the jury is readily apparent when the jury verdict is compared against the expert appraiser's testimony . . . the jury verdict almost adopts one or the other of UDOT's expert appraisers' position on value of the property taken and severance damage. After the testimony regarding the inadmissible Chevron offer and the unknown and undefined interchange properties, the jury was left with the impression that UDOT did the Landowner a favor by taking all of the properties' prime access.[18]

CONCLUSION

The difficulties apparent in UDOT's answering brief makes it clear that the trial court committed prejudicial error at trial. The judgment of the lower court should be reversed and a new trial ordered on the issue of just compensation in the case.

Respectfully submitted,

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January 13, 1993.

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[18]See Tr. at 759-60 (R. 1177-78).

Exhibit A

Rule 703. Bases of opinion testimony by experts.

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to him at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

Rule 801. Definitions.

The following definitions apply under this article:

(a) **Statement.** A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by him as an assertion.

(b) **Declarant.** A "declarant" is a person who makes a statement.

(c) **Hearsay.** "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.

(d) **Statements which are not hearsay.** A statement is not hearsay if:

(2) **Admission by party-opponent.** The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity, or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

Exhibit B

has been left, that there is a probability, as of February 1988, that this property could have been zoned commercial, do you?

THE WITNESS: Not zoned commercial, no.

MR. CAMPBELL: We object to the question on the grounds that it calls for speculation. There is no foundation for it.

THE COURT: Overruled. Do you understand the question?

THE WITNESS: I do.

THE COURT: You may answer it.

A. Supposing that it were zoned commercial, could -- I have forgotten the question.

Q. (By Mr. Coleman) Physically, would this property be accessible, given the configuration of the property in the after condition?

MR. CAMPBELL: Objection. That's vague and ambiguous as to what this property were accessible -- I mean, that has no definitive statement. I object to it.

THE COURT: Do you understand the question?

THE WITNESS: I do.

THE COURT: You may answer. Overruled.

A. Yes.

Q. What would your reason for that conclusion be?

A. Three reasons. Number one, there are many examples

of commercial development that are located near interchanges, that are not accessible just off of the interchange. So just by comparability, you could do it.

The second reason is that in a discussion with Heber Jacobsen, when I was -- met with him, he informed me that he had been negotiating with Chevron Oil to put a convenience store on the northeast corner of this site. And I believe that he -- in fact, he did state -- I have in my notes -- he was negotiating at $18 a square foot. But if the access -- if it was not accessible off of Big Cottonwood Canyon Road, that the offering price was somewhere in the neighborhood of 10 to 12. I called Chevron Oil, to ask them if this was the case. They confirmed it. They did confirm the $18. And they said that Al Frandsen, I spoke with -- he said that the accessibility off of Big Cottonwood Canyon, he would like to have it, but knew that he couldn't have it, and he is willing to pay $18 a square foot --

MR. CAMPBELL: I am going to object to this. This has been -- this whole area of examination has been framed to get in this one statement. I am going to object to it. I am going to ask that the entire area go out, and this witness' last statement that somebody was willing to offer something is clearly not evidence in this courtroom. The Supreme Court has spoken on this time and again. I object to it.

THE COURT: The portion of the answer that related

to a negotiated offer will be stricken from the record. The rest of the answer will remain. You may proceed with the balance of your answer.

A. Nevertheless, Mr. Frandsen did indicate that he would pay the same price for an access off of 30th East, would love to have that location.

MR. CAMPBELL: I am going to object to that, as well. It is just the same thing. It is just a -- it is the same answer. It is just simply disguised in wolf's clothing. I object to it.

THE COURT: Technically, the objection is correct. The objection is sustained. Answer the rest of the question.

A. I don't know what else to answer, except to say that --

MR. CAMPBELL: The witness has answered the question, along with many others.

THE COURT: Have you answered the question fully, to your satisfaction?

THE WITNESS: I guess just a point of clarification, and that is that I doubt that they would -- I don't believe that they would ever get the zoning for it.

MR. CAMPBELL: If the Court please, this has absolutely no -- this witness now is in the area of talking about the probability of rezoning. It stemmed from the very issue we just discussed with the Court at the bench. That was

THE COURT: Does the question or the answer assume that the property would be zoned commercially?

MR. CAMPBELL: Indeed, it did. And there is no evidence before the Court, and that is not the position of the State in this case. I mean, they have indicated to the Court that they were not going to make the claim that this property had now had an increased or higher use to put the property to after the taking, that there was no benefits.

THE COURT: What is your response to the Court's question about the reframing of the question?

MR. CAMPBELL: May I continue?

THE COURT: Let's clear that matter up first.

MR. CAMPBELL: I think that that did not clear up anything. I indicated to the Court, at the bench, that, indeed, that what Counsel said is I want you to assume a commercial use on the property. That was the first question. That's what brought my objection. And the Court then suggested to Counsel, if you were to ask the question, if the property were to be used for commercial purposes, is there accessibility? At least that's the way that the question was put. Is there accessibility to the remaining property, for that sort of use?

Judge, it became very clear that is not the case of the State. They don't maintain that position. There was only one reason for that testimony to come in, and that was so that

this witness -- it was a set-up deal in this courtroom. It was a framed question, so that that witness could testify as to a statement or a conversation with one of the partners in the partnership, Jacobsen.

And he went on to testify, over objection, if the Court please, that the property would have had a value of $18 a foot, square foot, but that without any access the property could still have maybe $12 a square foot. That, your Honor, is absolute inflammatory evidence. It is to suggest to the Court and jury, clearly, it is relevant, is this property worth $12 a square foot after the taking? That's what this evidence points to. There is no other way that anybody can justify or sustain the relevancy of it.

And, your Honor, the difficulty I have with that is that that question was a setup, and, fortunately, while I didn't know it was coming at the time, it was very clear, that I approached the Court and asked the Court for leave to find out, where are we going with a question like this? I mean, I said to the Court, suppose they ask him to assume that the property could be zoned C-3 for skyscrapers. Is there access for that?

And I submit to the Court that that was wholly hypothetical and speculative, and that, in fact, the question was set up, it doesn't play a part of their case in chief at all, Judge. You asked counsel for the State, how is this

relevant to your case on compensation? And it isn't. There is no testimony to that effect, except for the highly prejudicial statement about this conversation.

When I first heard it, I thought it may be an admission of a party opponent. Therefore, I can't object to that. But it turned out to be much more than that. It turned out to be a statement with regard to an offer. Offers are not admissible before this Court.

There are at least three reasons why this testimony ought to go out. If I have to cross-examine in this area, then I run the risk of just reemphasizing the very issue. It is highly inflammatory. It comes in this case after nearly a week of trial, in which this Court has closely guarded its rules on evidence. While it has been, admittedly, liberal in many of its rulings, yet it was very, very clear that this was not part of the case in chief of the State, nor is it in rebuttal to any testimony of the landowner. It is highly inflammatory.

If it is allowed to stand, then it can be argued. I submit to the Court that there is no answer to that, that I can give, because if the Court allowed it in, it must have relevance. And it doesn't have any relevancy. As I say, on top of it, it doesn't carry the good faith that is required of a party in submitting a case in chief. It was a setup for the Court.

Unfortunately, the jury has now heard the evidence. I think with a proper instruction at this time -- that's why I have asked for the time at this moment -- the Court can correct that. But, otherwise, it will become very significant and perhaps very prejudicial. When somebody starts talking about $18 a square foot, but, oh, dear, if you don't have any access, maybe only $12 a square foot. Those are offers, Judge. And they are absolutely irrelevant and improper.

THE COURT: Response?

MR. COLEMAN: Your Honor, I would agree with Counsel that the amounts should not have come in. I did not anticipate that they would. The purpose --

THE COURT: How do you propose that the Court deal with that matter, without emphasizing the problem of which Counsel complains?

MR. COLEMAN: As far as the amount is concerned, I don't know, your Honor. That shouldn't have come in, the amount. And the purpose for the testimony was to indicate that in the after condition, if there was a demand for commercial property in the before, it was still there in the after. And the problem is the defendants, in their case in chief, indicated that the highest and best use of the property in the before condition was commercial, had some commercial value, and highest and best use. The plaintiff's position was -- is, and has been, that it did not have a commercial

highest and best use in the before condition, it had a highest and potential best use in office space.

The reason for bringing the testimony out with this witness, with regard to inquiries respecting commercial development in the after, it was to show that if this property could have been used for commercial purposes in the before condition, it could have been used for commercial purposes in the after condition. Simply put, that is it in a nutshell. That if this property had any commercial potential in the before, it also had it in the after. Simply put, that's it. Nothing more, and nothing less.

THE COURT: How do you propose that we correct the portion of the expert witness' answer relating to values?

MR. COLEMAN: The only way I can suggest, your Honor, is that the testimony with regard to the values be stricken and disregarded by the jury. I don't know of another way of doing it.

THE COURT: Anything else?

MR. COLEMAN: No, your Honor, that's all.

THE COURT: Response?

MR. CAMPBELL: Quickly, the State's argument just simply won't hunt. It just -- that dog won't hunt, because the witness wasn't talking about the fair market value of the property before the taking. The question specifically ran to what the use of the property would be after the taking. And

we haven't claimed -- heaven's sakes, we haven't claimed in this case that this property could be used for commercial purposes in the condition in which it has been left. So it didn't go to any rebuttal. We have been substantially prejudiced as a consequence of this. I submit that the entire area ought to go out, not just the area with regard to the offers, but -- specifically, as to those, it ought to -- but also the entire area of examination ought to go out.

THE COURT: The Court is disinclined to throw the baby out with the bath water. If Counsel, between you, can agree on a surgically clean method of excising the reference to the value, the Court believes that, with all of the testimony the jurors have heard the last several days, this particular testimony is not going to have any significant impact for or against either party. The Court will instruct the jury according to its own assessment of the problem, or the Court will instruct the jury pursuant to a stipulation of both counsel, either way.

MR. CAMPBELL: I believe in the Court's wisdom. The Court has conducted this trial very ably. The Court can -- as ruled on my motion -- I am not prepared to stipulate to how it is done, but I think the Court certainly, in -- as I say, in exercising the clear wisdom it has, can take care of the problem.

THE COURT: The Court proposes to instruct the jury

to disregard any reference by the witness now on the stand to value of the property as it related to an alleged statement by Mr. Jacobsen on the $18 before, $12 -- $18 with, $12 without the access.

MR. COLEMAN: I think he followed that up, also, with testimony from a representative of Chevron Oil, where the testimony -- where the conversation with the representative from Chevron Oil was that there wouldn't be any difference in the value, even with the restriction of access.

MR. CAMPBELL: That's when the objection came in, your Honor. So that the whole area --

THE COURT: The defendants' motion to strike those portions of the testimony previously referred to, relating to the $18 versus the $12 value of the questioned property, and the confirming reference by Chevron Oil regarding those values, will be stricken from the record. Counsel are not to refer to them in argument or in any further proceedings.

Bring the jury back.

(The jury returned to the courtroom.)

THE COURT: The record will reflect the presence of the jury, the alternate, counsel and the parties. Ladies and gentlemen, it is not uncommon for the Court, in a trial of this complexity and this duration, to occasionally tell the jury to just disregard something they have heard. The Court is telling you to do that. It happens occasionally. And the

Court has confidence in the maturity and the responsibility of the jurors to the extent that they will do as the Court tells them.

There has been some testimony given by the witness now on the stand regarding statements made by a Mr. Jacobsen, and confirmed by Chevron Oil, regarding the value of the questioned property per square foot. Specifically, there was a reference of $18 per square foot with access, $12 per square foot without access. Supposedly, that value was confirmed by a representative of Chevron Oil. Disregard the portion of the expert witness' testimony that referred to that subject matter.

You may proceed.

MR. COLEMAN: Your Honor, just a housekeeping item, we had offered Plaintiff's Exhibit 17. I don't know if that was admitted.

MR. CAMPBELL: I think the Court --

THE COURT: In light of the Court's ruling, is the exhibit appropriate otherwise?

MR. CAMPBELL: I think Counsel did offer it, and the Court -- I had an objection to it, because of the method that this witness used, and the Court said that is a matter of cross-examination.

THE COURT: It is. The exhibit is received. You may proceed.

CERTIFICATE OF SERVICE

I hereby certify that I am a member of and/or employed by the law firm of Campbell Maack & Sessions, One Utah Center, Thirteenth Floor, 201 South Main Street, Salt Lake City, Utah, and that in said capacity and pursuant to the Utah Rules of Appellate Procedure, four true and correct copies of the Reply Brief of Appellants were served upon:

Donald S. Coleman, Esq.
Assistant Attorney General
236 State Capitol Building
Salt Lake City, Utah 84114

by U.S. mail, postage prepaid, this 13th day of January, 1993.

Dated this 13th day of January, 1993.

CAMPBELL MAACK & SESSIONS

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